to make its policies more attractive. As the underwriter is under no obligation to accept an application for insurance on receiving it, it is possible, even if not altogether feasible, for him to inquire about the representations therein before issuing the policy.[11] If the clause of incontestability is enforced the practical result will be that the underwriter will be more vigilant while the matter is fresh [12] and that fewer policies will be issued to unsuitable persons. It is most undesirable, moreover, that it should lie in the power of the company to resist every claim with an allegation of fraud, advanced for the first time after the death of the person accused.[13]

When the clause makes the policy incontestable not from date, but after a given period, as is more common, its practical and intended effect is merely to create a short statute of limitations in favor of the insured.[14] This is not open to the objection of condoning fraud.[15] It would seem that it should be valid in those jurisdictions which respect agreements to shorten the statutory limitation, but invalid in those which do not. States holding the former view have always given the clause effect.[16] But one court, though bound by the latter view,[17] has recently held that a clause providing for incontestability after one year bars the defense of fraud after that time. *Citizens' Life Ins. Co.* v. *McClure*, 127 S. W. 749 (Ky.).[18] Its decisions seem irreconcilable,[19] and the latest case is a strong one for the validity of the incontestability clause.[20]

WHAT IS CRUEL AND UNUSUAL PUNISHMENT. — The inhibition of the infliction of "cruel and unusual punishment" first appears in the

c. 576, § 75, p. 896. In none, however, must the clause provide for immediate incontestability. For example, see N. Y. LAWS, 1906, c. 326, § 101 (amended by LAWS, 1907, c. 714).

[11] See Ins. Co. *v.* Fox, *supra.*

[12] See Wright *v.* Mutual Benefit Life Assn., 43 Hun (N. Y.) 61.

[13] This argument was advanced in Mass. Benefit Life Assn. *v.* Robinson, *supra;* Clement *v.* Ins. Co., 101 Tenn. 22, in which cases, however, the clause did not provide for immediate incontestability. Of the cases on immediate incontestability, Ins. Co. *v.* Fox takes the view expressed here. *Contra*, Reagan *v.* Union Mutual Life Ins. Co., *supra;* Welch *v.* Union Central Life Ins. Co., *supra.* See 19 HARV. L. REV. 470.

[14] See Drews *v.* Metropolitan Life Ins. Co., 75 Atl. 167 (N. J.); Murray *v.* State Mutual Life Ins. Co., 22 R. I. 524. Several courts have said that they would make a distinction between the two kinds of clauses. See Reagan *v.* Union Mutual Life Ins. Co., *supra;* Mass. Benefit Life Assn. *v.* Robinson, *supra.*

[15] Thus equity will cancel the policy for fraud, at the suit of the insurance company brought within the period. John Hancock Mutual Life Ins. Co. *v.* Houpt, 113 Fed. 572.

[16] Most jurisdictions hold this view. See Mutual Life Ins. Co. *v.* New, 51 So. 61 (La.); Flanigan *v.* The Federal Life Ins. Co., 231 Ill. 399; Brady *v.* Prudential Ins. Co., 168 Pa. St. 645.

[17] Union Central Life Ins. Co. *v.* Spinks, 119 Ky. 261. See also Omaha Fire Ins. Co. *v.* Drennan, 56 Neb. 623.

[18] This is apparently the first case in which this precise situation has presented itself.

[19] See New York Life Ins. Co. *v.* Weaver's Administrator, 114 Ky. 295, in which the same court decided that after the period specified in the incontestability clause, an insurance company which had paid the face of the policy could not maintain an action for deceit.

[20] No case has been found holding that an incontestability clause taking effect after a specified time, does not bar the defense of fraud after that time.

Bill of Rights of 1689,[1] at a time when the inhumanity of Judge Jeffreys of "Bloody Assizes" fame [2] and of his fellows under the Stuarts, loomed large in the popular mind. This provision was aimed at the barbarities of that period, such as burning and quartering,[3] and did not otherwise mitigate the severity of the criminal law.[4] In the Eighth Amendment to the Constitution of the United States the same prohibition is found, and though its operation is confined to the Federal legislature and judiciary,[5] similar provisions are included in practically every state constitution.[6]

The authorities differ widely as to the interpretation of this restriction. Following the principle of statutory construction that words in a subsequent act are generally to be given their recognized meaning in a former act *in pari materia*, some courts have said that this clause still means what it did when used in 1689.[7] Others have held that whatever is now considered cruel and unusual in fact is forbidden by it.[8] Another difference of interpretation intersects these divergent views and separates the courts which confine the words to the kind or mode of punishment [9] from those who extend their meaning to include as well its degree or severity.[10] In a recent case concerning such a provision in the Bill of Rights of the Philippine Islands, which has the same meaning as the Eighth Amendment,[11] the Supreme Court of the United States, committing itself to the most liberal interpretation, not only held that the clause was concerned with the degree of punishment, but approved the extension of its scope to keep pace with the increasing enlightenment of public opinion. *Weems* v. *United States*, 217 U. S. 349. It is, indeed, difficult to believe that a law passed in the twentieth century is aimed solely at abuses which became almost unknown two hundred years before, even though it is an exact transcript of an old bill. And excessive punishment may be quite as bad as punishment cruel in its very nature. The fear of judicial intermeddling voiced by one of the dissenting judges seems scarcely warranted, for the power to prevent disproportionate punishment is to be exercised only when the punishment shocks public feeling.[12] With this limitation, the progressive construction of this clause laid down by this case seems desirable.

All courts would agree in holding some punishments forbidden, as, to chain a prisoner by the neck for several hours so that he must remain standing, a modern imitation of the pillory.[13] Other punishments are universally held to be permitted by the clause, as fine and imprisonment

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[1] 1 Will. & Mary, Sess. 2. c. 2.
[2] See MACAULAY, HISTORY OF ENGLAND, 2 ed., vol. i, pp. 638–646.
[3] See Hobbs *v.* State, 133 Ind. 404, 409.
[4] See People *ex rel.* Kemmler *v.* Durston, 119 N. Y. 569, 576.
[5] Pervear *v.* The Commonwealth, 5 Wall. (U. S.) 475.
[6] Constitution of New York, Art. I, § 5. In some constitutions there is a provision that punishment shall be proportionate to the offense. Constitution of New Hampshire, Part First, Art. 18.
[7] Whitten *v.* State, 47 Ga. 297, 301.
[8] People *ex rel.* Kemmler *v.* Durston, *supra*.
[9] Aldridge *v.* Commonwealth, 2 Va. Cas. 447; People *v.* Morris, 80 Mich. 634.
[10] State *v.* Driver, 78 N. C. 423. See O'Neil *v.* Vermont, 144 U. S. 323, 339, 340.
[11] Kepner *v.* U. S., 195 U. S. 100.
[12] See State *v.* Becker, 3 S. D. 29, 41.
[13] *In re* Birdsong, 39 Fed. 599.

or the ordinary death penalty.[14] But whipping, and lengthy imprisonment or death for a minor offense are questionable.[15] In determining whether a punishment is cruel and unusual, courts have considered not only the kind and degree of punishment and the magnitude of the crime,[16] but the special conditions in a particular locality,[17] and even the customs and beliefs of a particular class of individuals; so a regulation that the hair of every prisoner should be cut to a uniform length of one inch would be a cruel and unusual punishment if enforced against a Chinaman with a queue.[18] "Unusual" must be construed with "cruel" even when the provision is disjunctive,[19] and a new and humane method of inflicting the old punishment of death, as electrocution, is not prohibited.[20] Nor is a punishment unusual because never before inflicted for a certain crime, as the death penalty for attempt to rob a train.[21]

THE EFFECT OF THE PAROL EVIDENCE RULE ON DEFENSES TO NEGOTIABLE INSTRUMENTS. — The injustice which is so often reached by refusing strictly to admit any contradiction to or variation of the terms of a negotiable instrument has frequently led the courts to create exceptions to the parol evidence rule. But they have by no means agreed on what exceptions shall be allowed, and on this question the Negotiable Instruments Law is silent. As one theory of admissibility, it has been suggested that evidence of a collateral agreement should be admitted if an action and recovery thereon would result in circuity of action.[1] The weakness of this theory is the assumption that the collateral agreement can be made the basis of an independent action.[2] Another suggestion is that though this evidence should be excluded if it concerns express terms of the instrument, an oral variation of implied terms should be admitted, if it had to be oral to preserve the instrument's negotiability.[3] But a term implied by law is a component part of the instrument, so that to vary it, varies the instrument as it stands.[4] A more logical rule is the one generally adopted for other instruments. That is, to allow the evidence to show that the instrument itself, apart from collateral

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[14] State *v.* Borgstrom, 69 Minn. 508; *In re* Kemmler, 7 N. Y. Supp. 145.

[15] See *In re* McDonald, 4 Wyo. 150, 161; State *v.* Driver, 78 N. C. 423. See Thomas *v.* Kinkead, 55 Ark. 502, 508.

[16] But a sentence of five years' imprisonment for receiving stolen property is not "cruel and unusual," though the thief could not be punished so heavily. People *v.* Smith, 94 Mich. 644.

[17] Matter of Bayard, 25 Hun (N. Y.) 546.

[18] Ho Ah Kow *v.* Nunan, 5 Sawy. (U. S.) 552.

[19] Storti *v.* Commonwealth, 178 Mass. 549.

[20] *In re* Kemmler, *supra.*

[21] State *v.* Stubblefield, 157 Mo. 360.

[1] See 2 AMES, CASES ON BILLS AND NOTES, 802. The results in the following cases support this view. Patterson *v.* Todd, 18 Pa. St. 426; Barry *v.* Morse, 3 N. H. 132.

[2] All agreements prior to the execution of a written instrument are merged in it. Borggard *v.* Gale, 107 Ill. App. 128.

[3] See WIGMORE, EVIDENCE, §§ 2443–2445. The results in the following cases support this view. Castrique *v.* Buttigieg, 10 Moo. P. C. 94; Coughenour *v.* Suhre, 71 Pa. St. 462.

[4] Charles *v.* Denis, 42 Wis. 56; Union Co. *v.* Lockwood, 110 Ill. App. 387.